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**Harborlite Corporation and Teamsters Local Union
No. 455. Case 27–CA–21386**

December 22, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On March 8, 2010, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the General Counsel filed a cross-exception and supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

As explained in his decision, the judge found, consistent with well-established Board precedent, that the Respondent violated Section 8(a)(1) of the Act by threatening to lock out and permanently replace unit employees unless the Union agreed to the Respondent's bargaining demands. We agree with that finding. The judge further found, however, that the Respondent also violated Section 8(a)(3) and (1) by locking out unit employees while informing them that they would be permanently replaced. For the reasons set forth below, we find, contrary to the judge, that locking out unit employees in the circumstances presented here did not violate Section 8(a)(3) and (1). Accordingly, we shall dismiss that allegation.

As detailed by the judge, the Union and the Respondent participated in a number of bargaining sessions from June through August 2009, in an effort to reach agreement on a successor collective-bargaining agreement to the one that expired on June 30, 2009.² On August 21, the Respondent submitted what it deemed its last, best, and final offer to the Union, and on August 23, the unit employees voted to reject the Respondent's offer. On September 17, the Respondent notified the Union that it was "considering a lawful lockout of employees" in sup-

port of its bargaining position. On September 30, the Respondent sent the Union a message stating:

Please be advised that if an agreement is not reached by 7:00 PM Mountain Time on Wednesday, October 7th, the Company will exercise its legal right to lock out employees beginning with the night shift, 11:00 PM Wednesday night. Further, the Company will immediately begin hiring permanent replacements for the locked out employees.

At an October 6 bargaining session, the Respondent's labor relations manager stated that if the unit employees did not accept the Respondent's proposal by 11 p.m. the next day, the Respondent would "lock out and permanently replace" the unit employees. On October 7, the Respondent's plant manager urged two employees to reconsider the Respondent's proposal and told them that they could not win a fight against the Respondent and that they would be permanently replaced. The unit employees again rejected the Respondent's offer. When the union representatives met with the Respondent later that day to inform it of the rejection, the Respondent reaffirmed that as a result it would begin to hire permanent replacements on October 8.

Also on October 7, the Respondent sent a letter to the Union stating, in pertinent part:

This is to advise you that the Company is exercising its legal right to lock out all bargaining unit employees at the Company's Antonito and No Agua facilities in support of its bargaining demands. All such employees are locked out as of 11:00 PM, Wednesday, October 07, 2009. Current employees who report to work will be told that no work is available to them until an agreement is reached on a collective bargaining agreement.

....

The facilities will continue to operate using supervisory and replacement workers. Beginning Monday, October 12, 2009, we will begin hiring permanent replacements for the locked out employees. Any employees who are permanently replaced will be afforded all of their legal rights under the National Labor Relations Act and other applicable laws.

....

The lockout will end upon acceptance of the Company's last, best, and final offer. Such action will let us all get back to the main goal of assuring the viability if (sic) the Antonito and No Aqua operations.

¹ We shall modify the judge's conclusions of law, recommended Order, and notice to conform to the violation found herein. We shall also modify the judge's recommended Order to provide for posting the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

² All dates are 2009 unless otherwise indicated.

On October 8, the Respondent gave employees a letter explaining that they were being locked out and stating that “[b]eginning Monday, October 12, 2009, we begin hiring permanent replacements for locked out employees.” On October 14, the Respondent sent a letter to the Union, stating:

As you know, the Company has begun the process of hiring replacements for the locked out employees. We will continue that process and will hire replacements for all locked out employees. As a gesture of good will, we have decided to make the replacements temporary until further notice.

Although we believe that we have the right to hire permanent replacements, we will refrain from doing so in an effort to show that the Company is being more than reasonable. We hope this encourages the membership to accept the terms of our last, best and final offer. Such action will end the lockout, bring the locked out employees back to work, and allow us to get back to meeting our goal of assuring the long term viability of the Antonito and No Agua facilities.

On January 12, 2010, the Respondent informed the Union that it was ending the lockout, and on January 16 all bargaining unit employees returned to work.

As stated above, we agree with the judge’s finding that the Respondent violated Section 8(a)(1) by threatening to lock out and permanently replace unit employees unless the Union agreed to the Respondent’s bargaining demands. The Board has repeatedly held that “[a]n employer’s use of *permanent* replacements is inconsistent with a declared lawful lockout in support of its bargaining position.” *Ancor Concepts*, 323 NLRB 742, 744 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999). See also *Harter Equipment*, 293 NLRB 647, 648 (1989); *Bud Antle, Inc.*, 347 NLRB 87, 89 (2006) (“It is well settled that locked-out employees cannot be permanently replaced.”), petition for review denied 539 F.3d 1089 (9th Cir. 2008). Nevertheless, we find that the unlawful threat of permanent replacement, which was effectively withdrawn on October 14, before any permanent replacements were hired, was insufficient to warrant a finding that the otherwise lawful lockout violated the Act.³

In finding the lockout unlawful, the judge, relying on the Board’s decision in *Ancor Concepts*, supra, found that threatening to lock out and permanently replace unit em-

ployees was conduct inconsistent with a lawful lockout, and thus the Respondent’s decision to lock out employees after threatening to permanently replace them violated Section 8(a)(3) and (1). *Ancor Concepts* is distinguishable from the present case. In *Ancor Concepts*, employees engaged in a strike in support of the union’s bargaining position. When the union informed the employer of the strikers’ unconditional offer to return to work, the employer refused to take the strikers back until the parties reached settlement on a new collective-bargaining agreement, effectively locking them out. The employer later stated that the employees’ positions “have been filled by permanent replacements.” Thus, the employer in *Ancor Concepts* initiated a lawful economic lockout of former strikers, hired replacements, and then told the union representing the locked-out employees that the replacements were permanent. The employer’s actions, therefore, led the locked-out employees to believe that they had been permanently replaced and that they had lost the ability to automatically and immediately return to work even if they were to accept the employer’s terms. The Board in *Ancor Concepts* found that the lawful lockout ended with the declaration that the replacements were permanent because, in that situation, the employees could not “intelligently evaluate their position” after the employer indicated to them “that they would *remain* replaced even if they yielded to the [r]espondent’s bargaining demands.” Id. at 745 (emphasis added). The Board reasoned that under those conditions, the employer’s announcement that the employees *had been* permanently replaced “could have reasonably caused the strikers confusion in evaluating their bargaining strength.” Id.

The Board’s rationale for finding a violation in *Ancor Concepts* does not apply here. In the present case, the Respondent initiated a lockout in support of its bargaining position. Notwithstanding its prior threat to hire permanent replacements, it informed the Union on October 14 that it had “decided to make the replacements temporary.” Thus, the unlawful threat of permanent replacement was effectively withdrawn as of October 14, and there is no evidence that the Respondent had hired any replacements, permanent or otherwise, before that date. The October 14 letter further stated, “We hope this encourages the membership to accept the terms of our last, best and final offer. Such action will end the lockout, bring the locked out employees back to work, and allow us to get back to meeting

³ We have recently made clear that not all unlawful conduct by an employer during an otherwise lawful lockout renders that lockout unlawful. See *Peterbilt Motors Co.*, 357 NLRB No. 13 (2011) (holding that an unlawful failure to provide requested information during a lockout did not convert the otherwise lawful lockout into an unlawful one).

our goal.” Unlike the employer’s communications to employees in *Ancor Concepts*, the Respondent’s letter allowed employees to unambiguously evaluate their bargaining position. Thus, the Union was assured in that letter that if the membership accepted the Respondent’s terms, the locked-out employees would be brought back to work. For that reason, unlike the employees in *Ancor Concepts*, who were led to believe that they had already been permanently replaced and had therefore already lost their ability to immediately and automatically return to work even if the union accepted the employer’s terms, the employees here would not have reasonably believed, subsequent to the October 14 letter, that they would be unable to return to work upon accepting the Respondent’s final offer. The heart of the Board’s reasoning in *Ancor Concepts* was its conclusion: “In the instant case, the employees could not intelligently evaluate their position because the Respondent indicated to them (incorrectly in law) that they would remain replaced even if they yielded to the Respondent’s bargaining demands.” 323 NLRB at 745. The Respondent here made no similar statement. It did not inform the employees that they had been permanently replaced. In fact, it made clear that they had not been and would not be until further notice. In light of the Respondent’s effective withdrawal or, at least, deferral, of its threats of permanent replacement, and its assurances to the Union that unit employees would be reinstated if the Union accepted the Respondent’s terms, we find that the Respondent’s statements did not taint the otherwise lawful lockout.⁴ Thus, we find, contrary to the judge and our dissenting colleague, that the Respondent did not engage in conduct inconsistent with a lawful lockout, but instead

⁴ Our dissenting colleague agrees that this case, like *Ancor*, turns on what the locked-out employees understood about their bargaining status. The dissent finds that employees would have been confused by the Respondent’s October 14 letter. We simply disagree and find that the letter clearly and unambiguously explained that employees were temporarily replaced and that they could return to work by accepting the Respondent’s final offer.

Further, we do not believe that the Respondent’s statement that replacements were temporary “until further notice” confused its message to employees about their current status. It is undisputed that there was no further notice, and all unit employees returned to work on January 16, 2010. Thus, as of October 14, employees were assured that they were temporarily replaced, and they remained temporarily replaced until the lockout ended. During this period, they were free to continue the lockout or to agree to the Respondent’s terms and return to work, and they had no reason to believe otherwise.

The judge, citing *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), found that the Respondent’s October 14 letter did not undo the effects of its earlier unlawful permanent replacement threats. We agree and therefore find that the Respondent violated Sec. 8(a)(1) by making the threats. However, for the reasons explained above, we conclude that the threats did not render the lockout unlawful. Member Hayes does not pass on whether repudiation of unlawful conduct is ineffective unless it satisfies all of the requirements stated in *Passavant*.

acted with a legitimate objective of bringing economic pressure to bear in support of its bargaining position. Accordingly, we conclude that the lockout did not violate Section 8(a)(3) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 2.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Harborlite Corporation, Antonito, Colorado, and No Agua, New Mexico, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(b), 2(a), and (b) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(c) and reletter as 2(a).

“(a) Within 14 days after service by the Region, post at its Antonito, Colorado, and No Agua, New Mexico facilities copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 7, 2009.”

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 22, 2011

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN PEARCE, dissenting in part.

I agree with the judge and my colleagues that the Respondent violated Section 8(a)(1) of the Act by threatening to lock out and permanently replace unit employees unless the Union agreed to the Respondent's bargaining demands. Contrary to my colleagues, I also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by locking out unit employees and informing them that they were being permanently replaced. In *Ancor Concepts*, 323 NLRB 742 (1997), the Board held that an employer violated Section 8(a)(3) and (1) by locking out employees and subsequently informing them that they had been permanently replaced. The Board made clear in *Ancor* that its holding did not turn on the actual legal status of the locked-out employees. "We emphasize . . . that the determinative issue before us is whether the Respondent's conduct was consistent with the requirements of a lawful lockout and not whether the replacements were 'permanent' or 'temporary' employees." *Id.* at 745. Thus, *Ancor*, like this case, turned on what the employer said to the employees and the employees' resulting understanding of their status, not their actual legal status. Generally, the Board explained in *Ancor*, "an employer's conduct throughout the lockout must be consistent with the advancement of its legitimate bargaining position so that the employees are able to 'knowingly reevaluate their position.'" *Id.*, quoting *Eads Transfer*, 304 NLRB 711, 712 (1991), *enfd.* 989 F.2d 373 (9th Cir. 1993). Specifically, the Board held in *Ancor*, "In the instant case, the employees could not intelligently evaluate their position because the Respondent indicated to them (incorrectly in law) that they would remain replaced even if they yielded to the Respondent's bargaining demands." 323 NLRB at 745. Here, the Respondent sent precisely the same unlawful message.

After bargaining unit employees rejected what the Respondent characterized as its last, best, and final offer, the Respondent informed the Union on September 30,

2009,¹ and again on October 6, that if the employees did not accept its offer, the Respondent would lock out and permanently replace them beginning at 11 p.m. on October 7. The plant manager repeated the threat to two unit employees on October 7, and the Respondent notified the Union bargaining team (including some employees) on the same day that it would hire permanent replacements beginning October 8. A letter dated October 7 further advised the Union that the Respondent was proceeding with the threatened lockout, and would commence hiring permanent replacements on Monday, October 12. Finally, in a letter distributed on October 8, the Respondent notified unit employees that they were locked out and that, beginning on October 12, the Respondent would hire permanent replacements, a plan inconsistent with a lawful lockout. See *Ancor*, *supra* at 744; *Harter Equipment*, 293 NLRB 647, 648 (1989). Although the letter further stated that the lockout would "end upon acceptance of the Company's last, best, and final offer[.]" this message, combined with the Respondent's clear and repeated statements that it would hire permanent replacements, would at a minimum confuse employees and deprive them of the ability to intelligently evaluate whether they would be allowed to return to work even if they ultimately accepted the Respondent's demands. After all, if the lockout ends but the employees have been replaced permanently, none of them will be returning to work until new openings arise. These facts bring this case squarely within the holding of *Ancor*.² Thus, under the above precedent, the lockout was unlawful at its inception.

My colleagues attempt to distinguish this case from *Ancor* on the basis that the Respondent, through its October 14 letter to the Union, deferred its threat to permanently replace the locked-out employees. I find this dis-

¹ All dates are 2009 unless otherwise indicated.

² Although the Second Circuit denied enforcement of the Board's order in *NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55 (2d Cir. 1999), the court's holding turned on its differing construction of a single statement that the Board found informed employees that they had been permanently replaced. See *id.* at 58. Here, in contrast to *Ancor*, there is not just one, arguably ambiguous statement, but repeated statements in which the Respondent unequivocally informed employees that it would permanently replace them or, in the case of an October 14 letter, that it might permanently replace them at any time. Moreover, the court in *Ancor* questioned whether the theory adopted in the Board's decision was properly before it. *Id.* at 59. Finally, I believe that the court failed to give proper weight to the employer's statement that employees had been permanently replaced, when finding that statement had been qualified by the employer's offer to continue negotiations. The significance of the permanent replacement of employees is not that it ends negotiations or even that negotiations cannot result in the reinstatement of the employees. Rather, it deprives employees of the right to immediate reinstatement upon acceptance of the employer's terms, without further negotiations or agreement of the employer.

tion unavailing. Contrary to my colleagues' characterization, the Respondent's October 14 letter perpetuated rather than rescinded the previous unlawful threats of permanent replacement and, accordingly, did not mitigate the unlawfulness of the lockout. In the October 14 letter, the Respondent expressly reasserted that it was entitled to hire permanent replacements, held open that possibility, and merely postponed for an undefined time the exercise of its claimed prerogative "[a]s a gesture of good will" and "in an effort to show that the Company is being more than reasonable."

Neither the notification that the Respondent had decided retroactively to make the replacements only temporary nor the vague assurance that it would refrain from hiring permanent replacements "until further notice" dissipated the impact of the Respondent's unlawful conduct. The belated determination that the replacements whom the Respondent had "begun the process of hiring" were temporary, despite the Respondent's previous statements to the contrary, only underscores the Respondent's failure to notify employees accurately of their position at the beginning of the lockout so that they could knowingly choose a course of action. *Ancor*, supra at 743. Furthermore, the deferral of permanent replacement for some unspecified period at the Respondent's discretion provided employees little basis for decisionmaking, because they could not anticipate when or if the Respondent would again change their status. Thus, the employees knew only that for some window period, whether fleeting or long term, they could accept the Respondent's demands and return to work. That, in hindsight, the Respondent did not hire permanent replacements during the remainder of the lockout is of no consequence. We must evaluate whether the Respondent informed its employees of their status at the time that the lockout was ongoing, and the October 14 letter conveyed that their status was precarious and unpredictable.³

Thus, the Respondent's October 14 letter effectively reinforced its previous threats to permanently replace its locked-out employees. Although, by deferring the threatened permanent replacement "until further notice,"

³ Although, as my colleagues observe, the record does not reveal whether the Respondent had in fact hired any replacements by October 14, it admittedly had "begun the process" and so informed the Union in the October 14 letter.

the Respondent may have sought to shelter itself from the Board's sanctions for its unlawful conduct, the Act does not permit the Respondent to have it both ways.

Dated, Washington, D.C. December 22, 2011

Mark Gaston Pearce, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to lock out and permanently replace employees unless the Union accedes to our bargaining demands.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HARBORLITE CORPORATION

Michael Cooperman, Esq., for the General Counsel.

J. Thomas Kilpatrick and Jeremy Tucker, Esqs. (Alston & Bird LLP), of Atlanta, Georgia, for the Respondent.

Michael J. Belo, Esq. (Berenbaum & Weinshienk, P.C.), of Denver, Colorado, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Alamosa, Colorado, on January 20, 2010. The

charge and amended charge were filed October 13 and December 9, 2009,¹ respectively, by Teamsters Local Union No. 455 (the Union) and the complaint was issued December 22. The complaint alleges that Harborlite Corporation (Harborlite or Respondent) violated Section 8(a)(1) and (3) of the Act by threatening to lock out employees and permanently replace them and thereafter locking out employees. Harborlite filed a timely answer that admitted the allegations of the complaint concerning the filing and services of the charge and amended charge, jurisdiction, labor organization status, and supervisory and agency status.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Harborlite, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Harborlite, a corporation, is engaged in the operation of a perlite mine located in No Agua, New Mexico, and has a warehouse and office facility in Antonito, Colorado, where it annually ships goods and materials values in excess of \$50,000 directly to points located outside the State of Colorado. Harborlite admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The main issue underlying this case is whether an employer can permanently replace employees that it has locked out.

As indicated, Harborlite maintains a warehouse and office facilities in Antonito, Colorado, and a perlite mining location in No Agua, New Mexico. The Antonito plant consists of three structures: the office complex, the garage, and the loading station. Harborlite is owned by its parent company, World Minerals, which is, in turn, owned by Imerys. The Union represents a bargaining unit composed of about 29 Harborlite employees from the production, maintenance and shipping departments at the Antonito facility and the No Agua mine. The most recent collective-bargaining agreement between the Union and Harborlite began on July 1, 2006, and ended on June 30, 2009. The agreement was subsequently extended through August 23. Following the expiration of the most recent contract, the unit employees continued to work for Harborlite without a contract in place.

From June 30 through the end of August, the Union and Harborlite participated in approximately eight bargaining sessions. James Adams, the business agent and vice president for Teamsters Local 455, acted as the chief negotiator for the Union in this matter. Harborlite's bargaining teams was lead by J. Thomas Kilpatrick, its attorney, and Chris Bloyer, labor relations manager; Paul Sowards, the plant manager at Harborlite's

facilities in Antonito and No Agua, also participated as a member of Harborlite's bargaining committee.

On August 21 Respondent submitted its last, best and final offer to the Union. On August 23 the union membership voted to reject Harborlite's final contract proposal and continued to work without a contract. On September 17 Harborlite sent the Union a letter that stated, in pertinent part:

As you recall, we entered into a gentlemen's agreement that neither party would resort to economic actions, i.e., strike or lockout, without notifying the other party. The company hereby terminates any such agreement and notifies you that it is considering a lawful lockout of employees in support of this bargaining position.

On September 30 Harborlite sent the Union a message confirming that the parties would meet again on October 6 and 7. Harborlite's message continued:

Please be advised that if an agreement is not reached by 7:00 PM Mountain Time on Wednesday, October 7th, the Company will exercise its legal right to lock out employees beginning with the night shift, 11:00 PM Wednesday night. Further, the Company will immediately begin hiring permanent replacements for the locked out employees.

On October 6, 2009, the Union and Harborlite's respective negotiating committees reconvened for another bargaining session. The Union's bargaining committee included two unit employees. The Union presented Harborlite with a single proposal regarding overtime. After several hours of consideration, Harborlite rejected this proposal and restated its "last, best and final offer." Harborlite did not make any new proposals at this meeting. Harborlite asked the Union to present its proposal to the union members again, and suggested another meeting between both parties on October 7, 2009. Bloyer advised the union negotiating committee that they had until 11 p.m. the following day to ratify Harborlite's proposal. Bloyer stated that if the unit employees did not accept Harborlite's proposed contract Harborlite would "lock out and permanently replace" the employees.

On October 7, 2009, Adams met with the membership at the Antonito plant and at the No Agua mine to discuss Harborlite's proposal. The membership again rejected the offer. Later that day, Adams, accompanied by the negotiating team including the two unit employees, met with Harborlite. Adams informed Harborlite of the members' decision to reject its offer, and Harborlite reaffirmed that, as a result, it would begin to hire permanent replacements on October 8, 2009.

On the very same day at roughly 5 p.m., Harborlite plant manager Paul Sowards had a conversation with Harborlite employees Jess Blea and Arthur Martinez. Both Blea and Martinez were at the loading station when Sowards approached them and noticed a picketing schedule that the Union had given them. Sowards asked what the schedule was, and Blea explained that it was a picketing schedule. Sowards urged both employees to reconsider the contract, explaining that the timing was not right due to the economy and the fact that Harborlite was not making money. Sowards advised the employees to

¹ All dates are in 2009 unless otherwise indicated.

“pick a fight that they could win and not lose”, that Harborlite had two high-priced attorneys and that the Union could not win even if it filed charges against Harborlite. Martinez then asked what was going to happen next and Sowards said that they would be permanently replaced.²

Also on the same day, October 7, Harborlite sent the Union a letter that read in pertinent part:

This is to advise you that the Company is exercising its legal right to lock out all bargaining unit employees at the Company's Antonito and No Agua facilities in support of its bargaining demands. All such employees are locked out as of 11:00 PM, Wednesday, October 07, 2009. Current employees who report to work will be told that no work is available to them until an agreement is reached on a collective bargaining agreement.

....

The facilities will continue to operate using supervisory and replacement employees. Beginning Monday, October 12, 2009, we will begin hiring permanent replacements for the locked out employees. Any employees who are permanently replaced will be afforded all of their legal rights under the national Labor Relations Act and other applicable laws. . . .

The lockout will end upon acceptance of the Company's last, best, and final offer. Such action will let us all get back to the main goal of assuring the viability if (sic) the Antonito and No Agua operations.

Effective October 7 at 11 p.m., Harborlite locked out all bargaining unit employees and the next day gave them a letter explaining to them that they were being locked out and that “Beginning Monday, October 12, 2009, we begin hiring permanent replacements for locked out employees.”

On October 14 Harborlite sent the Union the following letter.

As you know, the Company has begun the process of hiring replacements for the locked out employees. We will continue that process and will hire replacements for all locked out employees. As a gesture of good will, we have decided to make the replacements temporary until further notice. Although we believe that we have the right to hire permanent replacements, we will refrain from doing so in an effort to show that the Company is being more than reasonable. We hope this encourages the membership to accept the terms of our last, best and final offer. Such action will end the lockout, bring the locked out employees back to work, and allow us to get back to meeting our goal of assuring the long term viability of the Antonito and No Agua facilities.

Harborlite did not send this letter to employees; the employees instead learned of the letter from the Union sometime in mid November.

John Lewis is vice president of the International Chemical Workers Union Council/UFCW. That Union represents some employees in an enterprise related to Harborlite. Lewis urged Harborlite to end its lockout of the employees involved in this

case. On January 12, 2010, Harborlite informed the Union that it was ending the lockout explaining:

[Lewis] is well respected by our management team and we value his opinions and suggestions. We have carefully considered [Lewis's] request. As we have stated numerous times, we desire a cooperative relationship with our employees and their representatives. In our current situation, the locked out employees have conducted themselves professionally. In light of these two considerations, and as a demonstration of our continued good will and desire to resolve the dispute, we are ending the lockout effective immediately. Hopefully, this will lead to a mutually satisfactory resolution of the dispute and the continuation of a good relationship between the Company and the Union.

On January 16, 2010, all bargaining unit employees returned to work.

B. Analysis

An employer may lock out employees in support of its bargaining position and hire employees to temporarily replace the locked out employees until the lock out ends. *Harter Equipment*, 280 NLRB 597 (1986), affd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). The question presented in this case is whether an employer may hire permanent replacements³ for the locked out employees who would continue to work for the employer even after the lock out ends. In *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997), enf. denied *NLRB v. Ancor Concepts*, 166 F.3d 55 (2d Cir. 1999), the Board stated “An employer's use of *permanent* replacements is inconsistent with a declared lawful lockout in support of its position.” In the footnote supporting this proposition the Board stated:

See *Harter Equipment (Harter II)*, 293 NLRB 647, 648 (1989), in which the Board relied on the on the fact the locked-out employees were not strikers and therefore could not be permanently replaced to find that they were entitled to vote in a decertification election.

See also Justice Goldberg's concurring opinion in *Brown Food Store*, 380 U.S. 278, 293 (1965), in which he expressed “grave doubts as to whether the act of locking out employees and hiring permanent replacements is justified by any legitimate interest of the nonstruck employers.”

More recently in *Bud Antle*, 347 NLRB 87, 89 (2006), the Board stated “It is well-settled that locked out employees cannot be permanently replaced.” This language makes clear that an employer may not lawfully permanently replace its locked out employees. Harborlite argues that this language is mere dicta that I am free to disregard, but it is clear that the Board does not consider the issue as still in doubt.

² These facts are based on a composite of the credible testimony of Blea, Martinez, and Sowards.

³ Permanently replaced employees differ from discharged employees because permanently replaced employees have certain rights to be recalled to their old jobs once their permanent replacements leave the employment of the employer. *Laidlaw Corp.*, 171 NLRB 1366, enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Moreover, even if I were to disregard Board statements on the use of permanent replacements for locked-out employees, I would nonetheless conclude that such use is unlawful. This is so because the Board is charged with the initial responsibility of interpreting and applying the Act in a manner that considers the balance of economic resources available to labor organizations and employers during the collective-bargaining process so as not to undermine the specific language of the Act. Section 7, the “heart” of the Act, explicitly guarantees employees the right to attempt to improve their working conditions through collective bargaining. Allowing employers to lock out employees and then permanently replace them would seriously undermine this Section 7 right. After all, while being permanently replaced is different from being discharged, the difference is often more legalistic than real for those workers who are permanently replaced. In apparent recognition of consequence of allowing employers to lock out and then permanently replace workers, I have been unable to find any Board case to support Harborlite’s position in favor of permanent replacement. Put differently, in the over 75 years of the Act’s existence, no Board or Supreme Court precedent has supported Harborlite’s position. And there is no evidence in this record of changed circumstances that would justify providing employers with an additional powerful weapon for use during collective bargaining at the expense of the Section 7 rights. Harborlite relies heavily on *International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997). But that case involved a situation where an employer permanently subcontracted unit work, and that matter was a subject of discussion between the union and employer at the bargaining table. In any event, I am bound to apply Board law in the absence of clear Supreme Court precedent to the contrary. I therefore conclude that the Act does not allow an employer to permanently replace workers that it has locked out.

I now address the specific allegations of the complaint. The complaint alleges that on or about October 6 Boyer threatened to lock out and permanently replace its unit employees. I have concluded above that Boyer did, in fact, state in the presence of unit employees that Harborlite would lock out and permanently replace the unit employees. Just as it is unlawful to threaten to permanently replace unfair labor practice strikers, *United States Service Industries*, 319 NLRB 231, 233 (1995), it follows by threatening to lock out and permanently replace employees unless the Union acceded to its bargaining demands, Harborlite violated Section 8(a)(1). See, for persuasive value, *Wayview Care Center*, 352 NLRB 1089, 1105, 1089 fn. 2 (2008). The complaint alleges that on October 7 Sowards made a similar unlawful statement. I have concluded above that he did so. By doing so Harborlite again violated Section 8(a)(1). Finally, the complaint alleges that on October 8 Boyer notified employees that Harborlite was locking them out and would begin to hire permanent replacements. This allegation too is supported by the evidence; Harborlite again violated Section 8(a)(1). In making these finding I have considered the fact that on October 14 Harborlite informed the Union that it would not hire permanent replacements. In doing so, however, Harborlite reiterated its right to do so. This does not undo the effects of its earlier unlawful threats. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The complaint alleges that the conduct

described in this paragraph also violated Section 8(a)(3) of the Act, but this contention is unsupportable and I dismiss this allegation.

Pointing to *Eads Transfer*, 304 NLRB 711 (1991), *Ancor Concepts*, supra, the General Counsel contends that the lockout itself was unlawful. In *Ancor Concepts*, the Board stated:

Following the declaration of a lawful lockout, an employer that seeks to continue to invoke *Harter I* to justify its failure to reinstate striking employees on their unconditional offer to return to work must refrain from engaging in conduct inconsistent with an economic lockout. Such inconsistent conduct ends the lawful lockout and removes the employer’s privilege of invoking *Harter I*.

....

In the instant case, the Respondent’s counsel informed the Union by letter dated November 29 that the replacements were permanent employees. An employer’s use of *permanent* replacements is inconsistent with a declared lawful lockout in support of its bargaining position.[footnote omitted].

Ancor Concepts, supra at 744. The Board concluded that the lawful lockout ended in that case when the respondent informed the union that the replacements were permanent; the Board ordered backpay for the employees beginning November 29, the date the lock out no longer was lawful. See also *Eads Transfer*, supra. Applying that reasoning to this case, it follows that when Harborlite unlawfully threatened that it would permanently replace the employees it locked out, what otherwise might have been a lawful lock out became unlawful. In this case the unlawful conduct preceded the lock out and the lock-out therefore was unlawful at its inception.

In its brief, Harborlite argues that its threats to permanently replace the employees it was locking out did not have any adverse impact on employee rights. It argues that these threats would only increase the likelihood that the Union and the unit employees would accede to its bargaining demands and resolve the bargaining impasse. But this argument ignores the fact that these unlawful threats complicated the bargaining process by inserting an issue (permanent replacement of locked out employees) that required resolution through the litigation process before Harborlite and the Union could return to the bargaining table in an atmosphere clear of the unlawful threats. Put differently, the employees’ right to support the Union in its bargaining position and to resist Harborlite’s bargaining demands was significantly undermined by Harborlite’s unlawful threats. As the Union points out in its brief, the Board in *Globe Business Furniture*, 290 NLRB 841 fn. 2 (1988), considered preceding unfair labor practices committed by an employer in holding that the employer’s lock out violated Section 8(a)(3). Harborlite relies on the Court’s decision in *NLRB v. Ancor Concepts*, supra, but as indicated I am bound to follow Board law in the absence of clear Supreme Court precedence. By locking out employees after threatening that it would permanently replace the locked out employees, Harborlite violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. By threatening to lock out and permanently replace employees unless the Union acceded to its bargaining demands, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By locking out employees after threatening that it would permanently replace the locked out employees, the Respondent violated Section 8(a)(3) and (1) and Section 2(6) and (7).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily locked out employees, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from October 7, 2009 until January 16, 2010, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁴

ORDER

The Respondent, Harborlite Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to lock out and permanently replace employees unless the Union acceded to its bargaining demands.

(b) Locking out employees after threatening to permanently replace the locked out employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the locked out employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in No Agua, New Mexico, and Antonito, Colorado,

copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 7, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 8, 2010

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to permanently replace employees who we lock out.

WE WILL NOT lock out employees after threatening to permanently replace the locked out employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make the employees that we locked out whole for any loss of earnings and other benefits resulting from their lock out, less any net interim earnings, plus interest.

HARBORLITE CORPORATION

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

